

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

ORIGINAL

76-1362

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Respondent,

-against-

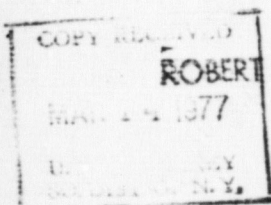
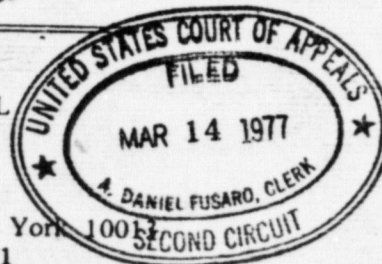
CHEUNG KIN PING and
LAI MONG WAH,

Appellants.

*On Appeal from the United States District Court for
The Southern District of New York*

PETITION ON BEHALF OF APPELLANT CHEUNG
KIN PING FOR REHEARING OR IN THE
ALTERNATIVE FOR THE ISSUANCE OF AN
ORDER STAYING THE MANDATE OF THIS
COURT AND CONTINUING THE APPELLANT ON
BAIL PENDING APPLICATION FOR CERTIORARI
TO THE SUPREME COURT OF THE UNITED
STATES

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INDEX

Page

AS TO A REHEARING OF THE LIMITED
ASPECTS OF THIS APPEAL

- I. THE RULING THAT IT WAS MERELY
"HARMLESS ERROR" TO ALLOW THE
JURY TO HEAR STATEMENTS MADE
BY APPELLANT CHEUNG TO GOVERN-
MENT AGENTS WITHOUT HOLDING A
HEARING MISCONSTRUED THE OVER-
WHELMING EFFECT THESE STATE-
MENTS, BOLSTERING TWO CO-
DEFENDANTS' TESTIMONY, MUST
HAVE HAD ON THE JURY.

3

CONCLUSION

5

CERTIFICATE

7

SUGGESTION FOR REHEARING EN BANC

8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Docket Numbers

-against-

76-1362, 76-1368

CHEUNG KIN PING and
LAI MONG WAH,

Appellants.

-----X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

PETITION ON BEHALF OF APPELLANT CHEUNG
KIN PING FOR REHEARING OR IN THE ALTER -
NATIVE FOR THE ISSUANCE OF AN ORDER
STAYING THE MANDATE OF THIS COURT AND
CONTINUING THE APPELLANT ON BAIL PEND-
ING APPLICATION FOR CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

To The United States Court of Appeals For The Second Circuit:

CHEUNG KIN PING, one of the appellants above named,
respectfully petitions this Honorable Court for a rehearing of the
appeal in the above-entitled case and in support of this petition
represents to the Court as follows:

The appellant reserves his argued position as to each
of the points heretofore raised on appeal, but in this petition addresses

himself solely to those aspects of the opinion of this Court decided on February 28, 1977, wherein the Court may be convinced that its result is based on the misapprehension of certain matters pertaining to the issue originally raised on appeal.

Therefore, this petition respectfully seeks to convince the Court that it has erred in its determination with respect to the following stated issue:

The ruling that it was "Harmless Error" to admit certain statements by the appellant Cheung to certain agents in Florida without a hearing de nova -- a hearing having been held in the Florida District Court and a decision denying suppression rendered -- the Court being of the opinion the statements did not comprise a "substantial part of the Government's case" (S.O. 2076)*.

If the instant petition for rehearing is denied, the appellant Cheung respectfully petitions this Court for the issuance of an order staying the mandate of this Court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

* Numerals preceded by "S. O." refer to pages of the Slip Opinion of this Court.

As To A Rehearing Of The Limited Aspects Of This Appeal

I.

The ruling that it was merely "Harmless Error" to allow the jury to hear statements made by appellant Cheung to Government agents without holding a hearing misconstrued the overwhelming effect these statements, bolstering two co-defendants' testimony, must have had on the jury.

In first acknowledging that appellant Cheung was entitled to a hearing to suppress certain admissions -- and adverse decision of the Florida District Court notwithstanding -- and then holding that the denial was "Harmless Error", this Court failed to give credit to the significant role of the defense counsel in devising defense strategy. In analyzing the facts the Court accepted the courier Ting's testimony as gospel -- capable of explanation. Likewise, the Court gave greater weight to the importer Yui's testimony than a jury might have, had not appellant's statements been before them.

Appellant Cheung's defense that he was acting innocently was dampened by the admission of these statements that were extracted from a person who does not speak English, employing as interpreters first a possible co-defendant whom appellant Cheung claimed was the intended recipient of the suitcase

containing the contraband, whose main interest must have been self-protection, and later a sea cadet who did not speak the same dialect, i. e., language, as appellant Cheung. Without these statements, defense counsel could have shown that appellant Cheung went to the dock at the appointed time merely to retrieve a suitcase containing overweight luggage that he could not bring with him on his return from Hong Kong without additional charge. That appellant Cheung was acting innocently when he accepted the package from Ting is further substantiated from his eagerness to cooperate with the authorities insofar as to pointing out from whom the package was received. This also was the initial testimony of Ting in the Florida District Court and before the Grand Jury in the Southern District of New York.

Instead of being confronted with two admitted narcotics smugglers, whose credibility is subject to question and with customs agents whose observations are equivocal or at least capable of explanation, appellant Cheung was confronted with a host of Federal Agents of unquestioned credibility as far as the Jury was concerned, reciting a statement of questionable authenticity that not only corroborated certain aspects of the co-defendants' testimony and fills a hole of knowledge of wrongdoing. Against these odds, defense counsel was hamstrung. Sans the admissions

it is a different ball game, one that cannot be relegated to the "Burialground of Harmless Error".

CONCLUSION

As to staying the issuance of the Court's mandate and continuing the appellant on bail pending application for a Writ of Certiorari to the Supreme Court

If the Court should deny the instant petition for a rehearing, the appellant Cheung intends to present to the United States Supreme Court a petition for a Writ of Certiorari. It is respectfully prayed that the issuance of the mandate of this Court be stayed and the petitioner continued on bail pending determination of said petition for a Writ of Certiorari.

Appellant Cheung is free on bail in the sum of \$15,000 surety bond. This bond was collateralized through the efforts of family and friends -- ten in number -- who supplied anywhere from \$500 to \$2,500 to secure appellant Cheung's release.

Appellant is divorced. He pays for the weekly support of an infant daughter, to whom he is attached and sees more than 2 or 3 times a week. Appellant Cheung has had no other conflicts with the law except those arising out of the facts of this case. He has always responded to the mandate of the Court and fulfilled his obligations. He is a legal resident alien, having been admitted for

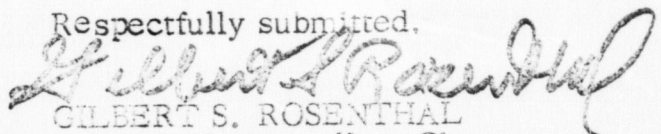
permanent residence by the Immigration and Naturalization Service.

It is respectfully submitted that the questions above discussed, as well as those set forth in the original appeal, are not frivolous but in fact are questions of great substance and significance which merits a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.

For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative, the issuance of the mandate of this Court be stayed and the appellant Cheung continued on bail pending the filing and disposition of his Petition for a Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted,



GILBERT S. ROSENTHAL
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(212) 226-7971

Dated: March ¹⁰, 1977.

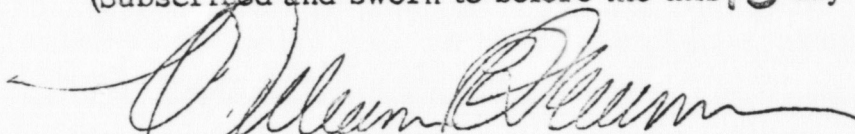
STATE OF NEW YORK)
 (ss.:
COUNTY OF NEW YORK)

GILBERT S. ROSENTHAL, being first duly sworn,
on oath certifies and says:

That he is the attorney for the appellant in this
cause; that he makes this certificate in compliance with the
rules of this Court; that in his judgment the within and foregoing
petition is well founded and is not frivolous or interposed for
delay.


GILBERT S. ROSENTHAL

(Subscribed and sworn to before me this 10 day of March, 1977)


WILLIAM C. HERMAN

Notary Public, State of New York
No. 60-1770600
Qualified in Westchester County
Term Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA

-against-

SUGGESTION FOR A
REHEARING EN BANC

Docket No. 76-1362

CHEUNG KIN PING and
LAI MONG WAH,

Appellants.

-----X

The Petitioner, CHEUNG KIN PING, suggests to this Court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard en banc for the following reasons:

1. The issue raised by Petitioner in the Petition directly confronts the issue of whether a denial of a hearing to suppress admissions claimed to be in violation of Petitioner's Fifth Amendment rights can be relegated to the "Burial ground of Harmless Error" when these admissions were so damaging as to lend weight and credence to testimony of co-conspirators and supply a necessary element of the crime -- knowledge. The importance of this question raised by Petitioner in his appeal is of great and general significance.

2. The decision entered by this Court affirming Petitioner's conviction came almost four months after oral

argument, and in this Court's Opinion it was acknowledged that
Petitioner's argument had force.

WHEREFORE, the Petitioner, CHEUNG KIN PING,
respectfully suggests that he be granted a rehearing of the above
appeal en banc.

Yours, etc.



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ROSENTHAL

AFFIDAVIT OF PERSONAL SERVICE

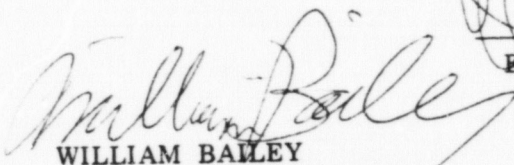
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 14 day of March, 19 77 at No. 1 St. Andrews Pe., NYC

deponent served the within Petition
upon U.S. Atty., so. Dist. of NY

the Respondent herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Respondent therein.

Sworn to before me this
14 day of March 1977

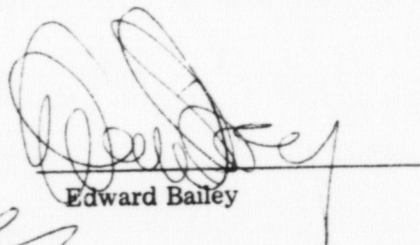

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1978


Edward Bailey